**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**FIRST APPEAL No. 841 of 1985**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE KS JHAVERI**

==========

**NATIONAL INSURANCE CO.LTD. - Appellant(s)**
**Versus**
**MOHANLAL SHANKARLAL JOSHI & 2 - Defendant(s)**

==========

**Appearance :**

MR RAJNI H MEHTA for Appellant(s) : 1,
MR BP JOSHI for Defendant(s) : 1,
None for Defendant(s) : 2,
NOTICE SERVED for Defendant(s) : 2.2.1, 2.2.2,2.2.3
MR SV RAJU for Defendant(s) : 3,

==========

**CORAM : HONOURABLE MR.JUSTICE KS JHAVERI**

**Date : 01/09/2006**

**ORAL JUDGMENT**

1.0 By way of this appeal, the appellant has challenged the judgment and award of the Motor Accident Claims Tribunal (Main), Banaskantha at Palanpur passed in M.A.C.P. No.231 of 1982 dated 12.12.1984 whereby the Tribunal partly allowed the said petition.

2.0 The brief facts of the case are that on 15.08.1981, when present opponent No.1 was going to Palanpur from Ambaji in a jeep-car driven by

driver of the present opponent No.3, the said jeep-car met with an accident. On account of the said accident, opponent No.1 received serious bodily injuries, and hence, he filed a petition claiming Rs.50,000/- by way of compensation.

2.1 In the said petition after hearing the parties, the Tribunal passed the judgment and award which is under challenge in this appeal.

3.0 Heard. It was the case of opponent No.1 before the Tribunal that on the day of incident, the driver of opponent No.3 was driving the said jeep-car in a rash and negligent manner, on account of which said jeep-car dashed with a pillar stone and the accident in question took place. Opponent No.3 has tried to controvert the story put forward by opponent No.1. According to him, while the said jeep-car was coming down the slope, its brakes failed and on account of that the said accident occurred. However, the story narrated by opponent No.3 was not believed by the

Tribunal. On perusal of 'Panchnama' of the scene of offence it appears that the width of the road is 12' feet and mile stone is at a distance of about 10' from the said road. Hence, it clearly transpires that said jeep-car had traveled almost 16' feet beyond the road before dashing with the said mile-stone. The said fact is not challenged by opponent No.3, and hence, the Tribunal was justified in coming to the conclusion that the accident in question took place on account of sole negligence on the part of the driver of the said jeep-car. The tribunal, therefore, awarded an amount of Rs.24,730/- with 6 per cent interest by way of compensation and directed the appellant as well as opponent No.3 to satisfy the same.

3.1 Learned Advocate for the appellant has raised a contention that the Tribunal ought to have exonerated the appellant from the liability to satisfy the claim. As regards the said contention, it would be relevant to refer to an unreported decision of this Court in First Appeal

Nos.1408 and 1409 of 1984 and F.A. No.1413 of 1984 wherein it was held as under,

> "The learned Counsel appearing for the Insurance Company contended that the **evidence on record established that the claimant were using the vehicle on hire, that there was an exclusionary term in the Policy making it clear that it did not cover use of the vehicle for hire, that no permit was obtained for using the said vehicle as a commercial vehicle as required by Section 42 of the Motor Vehicles Act, 1939 and that the owner of the vehicle was aware that the vehicle was being used for hire.** He therefore, submitted that the Insurance Company was not at all liable to pay the compensation under the impugned award to any of these claimant.
>
> The learned Counsel appearing for the claimant have submitted that in order to successfully disclaim it's liability on the grounds mentioned in **Section 96(2)(b) of the said Act the insurer is required to establish that the vehicle was used by the insured or at his instance in breach of specific conditions including the condition that passengers for hire or reward were not to be carried in the vehicle. It was submitted that if this was done without the knowledge of the insured by the driver's act or omission, the insurer would still be liable to indemnify the insured.** Reliance was placed in support of this submission on the decision of the Full Bench of this Court in New India Assurance Company Limited Vs. Kamlaben and ors., reported in XXXIV(1) GLR 779.

Section 95 of the said Act of 1939 dealt with requirement of Policies and limits of liabilities. Under the said provision it was mandatory that a Policy of Insurance must comply with the requirements enumerated therein. Accordingly, as provided by Section 95(1)(b)(ii), a Policy of Insurance must be a Policy which insures person or classes of person specified in the Policy to the extent specified in sub-section (2)against the death or or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. As laid down in the proviso (ii) to Section 95(1)(b), a Policy was not required to cover liability in respect of the death of or bodily injury to persons being carried in or upon the vehicle at the time of the occurence of the event out of which the claim arises except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment. Therefore, proviso (ii) does not affect the statutory liability of the insurer in respect of a public service vehicle as provided for under Section 95(1)(b)(ii) of the said Act. The expression `public service vehicle' in clause (ii) of Section 95(1)(b) is to be read in context of its definition in Section 2 (25) of the said Act and accordingly, it would inter-alia mean any motor vehicle used for the carriage of passengers for hire or reward. The words 'any motor vehicle' would include even a private motor vehicle and therefore, when a private motor vehicle is actually used for the carriage of passengers for hire or reward it becomes a public service vehicle at

that time, even if no permit was obtained in respect thereof under Section 42 of the said Act. Therefore, the contention that as no permit was obtained under Section 42 of the said Act in respect of the said vehicle for its use as transport vehicle, the Insurance Company would not be liable, cannot be accepted. In such cases, the Insurance Company would still be liable by virtue of the provisions of Section 95(1)(b)(ii) to the extent of liability indicated under sub-section (2) of Section 95. As provided by sub-section (2)(b)(ii) of Section 95, a Policy of Insurance shall cover any liability incurred in respect of any one accident upto a limit of 15,000 rupees for each individual passenger in respect of passengers carried for hire in such vehicle. However, in cases, where there is a specified condition in the Policy which excludes the use of the insured vehicle for the carriage of any passenger for hire or reward and the vehicle was in fact used in breach of such specified condition, the benefit of statutory insurance will not be available in respect of such passenger. This position emerges from the Full Bench decision of this Court in the case of New Inddia Assurance Company Limited Vs. Smt. Nathiben XXIII(1) G.L.R 411.

In New India Assurance Company Limited Vs. Smt.Nathiben (supra), the Full Bench in context of the provisions of Section 95 and 96 of the said Act held that the insurer, in order to successfully disclaim his liability will have to establish:- (1) that on the date of the contract of insurance, the insured vehicle was expressly or implicitly not covered by a permit to carry any passenger for hire or

reward; (2) that there was a specific condition in the Policy which excluded the use of the insured vehicle for the carriage of any passenger for hire or reward and (3) that the vehicle was, in fact, used in breach of such specified condition on the occasion giving rise to the claim, by using of the carriage or the passenger thereof for hire or reward. If all these conditions are established by the insurer, the benefit of statutory insurance will not be available in respect of such passengers. The provisions of Sections 95 and 96 again came to be considered by another Full Bench of this Court in New India Assurance Company Limited Vs. Kamlaben, reported in XXXIV(1) G.L.R 779 in which the Full Bench, in addition to the three requirement enumerated by the earlier Full Bench in New India Assurance Company Vs. Nathiben (supra) which would enable the insurer to successfully disclaim his liability, added the fourth requirement by holding that in order to successfully disclaim his liability on the ground mentioned in Section 96(2) (b) of the said Act, the insurer has also to establish - "that the vehicle was used by the insured or at his instance in breach of specified conditions including a condition that in the goods vehicle passengers for hire or reward were not to be carried. If it is done without knowledge of the insurer by the driver's act or omission, the insurer would be liable to indemnify the insured."

3.2 Similar principle has been followed by this Court in the case of ***"United India Insurance***

***Co. Ltd. V. Chhatrasing Parbatsing Rathod & Ors.”*** reported in 1999(2) GLR 1100 and in the case of ***“New India Assurance Co. Ltd. V. Kiritbhai Lalchand Shah & Ors.”*** reported in 2002(1)GLR 288.

3.3 In the case on hand, it is not in dispute that opponent No.2 was working as driver with opponent No.3. Hence, the contention of learned Advocate for opponent No.3 that driver was carrying the passenger in the said jeep-car out of knowledge of opponent No.3, requires to be rejected. On the contrary, on perusal of insurance policy (Exh.48) of the vehicle in question it clearly transpires that the said vehicle was a private vehicle and was not permitted to carry passengers for hire and reward. Therefore, since there was breach of a condition of insurance policy, the Tribunal has committed an error by holding the appellant liable to satisfy the claim. Hence, in view of the principle laid down in the above mentioned unreported and reported decisions of this Court

and taking into consideration the facts and circumstances of the present case, the finding of the Tribunal holding the appellant liable to satisfy the claim requires to be reversed.

4.0 In the result, the appeal is allowed. The judgment and award of the Motor Accident Claims Tribunal (Main), Banaskantha at Palanpur passed in M.A.C.P. No.231 of 1982 dated 12.12.1984 is quashed and set aside qua the appellant-Insurance Company only. It shall be open for the original claimant to recover the amount of compensation from the owner. The amount deposited by the appellant-Insurance Company shall be refunded to it, if not ,already, been withdrawn by the original claimant. If the amount has, already, been withdrawn by the claimant, the appellant shall recover the same from the owner and not from the claimant. No order as to costs.

(K.S. Jhaveri,J.)

Umesh/